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05-0154
05-0156
05-0174

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT
201 W. MONROE STREET
P.O. BOX 19206
SPRINGFIELD, IL 62794-9206

CLERK OF THE COURT
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RESEARCH DIRECTOR
(217) 782-3628

DATE: 01/05/07

RE: Ill. Bell Telephone Co. v. Illinois Commerce Comm. et al.
General No: 4-05-0697
ICC 05-0154
Rule 23 Filed: 07/27/06

I have today issued the mandate of this court in the above entitled cause, pursuant to the provisions of Supreme Court Rule 368.

DARRYL PRATSCHER, CLERK
Appellate Court
Fourth District

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State of Illinois
Appellate Court
Fourth Judicial District

In the APPELLATE COURT sitting at SPRINGFIELD, within and for the State of Illinois.

Present: Honorable JOHN T. MCCULLOUGH, Judge
Honorable JAMES A. KNECHT, Judge
Honorable ROBERT W. COOK, Judge

BE IT REMEMBERED, that on the 27th day of July, 2006, the final judgment of said Appellate Court was entered of record as follows:

ILLINOIS BELL TELEPHONE COMPANY,
Petitioner-Appellant,
v.
THE ILLINOIS COMMERCE COMMISSION; CBEYOND COMMUNICATIONS, LLP; GLOBAL TELDATA II, LLC; McLEODUSA TELECOMMUNICATIONS SERVICES, INC.; NUVOX COMMUNICATIONS OF ILLINOIS, INC.; TALK AMERICA, INC.; XO COMMUNICATIONS SERVICES, INC., f/k/a XO ILLINOIS, INC.; and ALLEGIANCE TELECOM OF ILLINOIS, INC.,
Respondents-Appellees.

General No: 4-05-0697

ICC No.
05-0154
05-0156
05-0174

It is the decision of this court that the order on appeal be AFFIRMED and stand in full force and effect.

Costs, if any, to be taxed in accordance with the law.

As Clerk of the Illinois Appellate Court for the Fourth Judicial District and keeper of the records, files and Seal thereof, I certify that the foregoing is a true statement of the final order of said court in the above entitled cause, of record in my office.

IN WITNESS WHEREOF, I have set my hand and affixed the Seal of the Illinois Appellate Court for the Fourth Judicial District, this 5th day of January, 2007.

Clerk, Appellate Court for the
Fourth Judicial District

NO. 4-05-0697

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

ILLINOIS BELL TELEPHONE COMPANY, Petitioner-Appellant, v. THE ILLINOIS COMMERCE COMMISSION; CBEYOND COMMUNICATIONS, LLP; GLOBAL TELDATA II, LLC; McLEODUSA TELECOMMUNICATIONS SERVICES, INC.; NUVOX COMMUNICATIONS OF ILLINOIS, INC.; TALK AMERICA, INC.; XO COMMUNICATIONS SERVICES, INC., f/k/a XO ILLINOIS, INC.; and ALLEGIANCE TELECOM OF ILLINOIS, INC., Respondents-Appellees.	)	Appeal from Illinois Commerce Commission Nos. 05-0154 05-0156 05-0174

ORDER

on June 2, 2005, the Illinois Commerce Commission (Commission) entered an order finding the interconnection agreements between petitioner, Illinois Bell Telephone Company, and respondents, (1) Global TelData II, LLC (Global), (2) McLeod USA Telecommunications Services, Inc. (McLeod), (3) Talk America, Inc. (Talk), (4) XO Communication Services, Inc. (XO), and (5) Allegiance Telecom of Illinois, Inc. (Allegiance) "contain an SBC obligation to provide loops, transport and switching under [s]ection 271." Further, the Commission found petitioner had engaged in anticompetitive conduct in violation of section 13-514 of the Illinois Public Utilities Act (Public Utilities Act) (220 ILCS 5/13-514 (West 2004)). The Commission awarded respondents various portions of their attorney fees and ordered petitioner to pay a portion of the Commission's costs.

Petitioner appeals, arguing that the Commission failed to properly interpret the interconnection agreements, and failed to properly interpret section 13-514 of the Public Utilities Act. We affirm.

Until the 1990s, the market for local telephone service was widely viewed as a natural monopoly. Congress passed the Telecommunications Act of 1996 (Telecommunications Act) (47 U.S.C. § 251 et. seq. (2004)), to encourage competition by requiring established incumbent local exchange carriers (ILECs) to provide new competitive local exchange carriers (CLECs) with access to certain portions of their existing networks, a process known as unbundling. Section 251(a)(1) (47 U.S.C. § 251(a)(1) (2004)) of the Act sets forth the general duties of telecommunications carriers to interconnect with the facilities and equipment of other telecommunications carriers. Section 251(c)(2) (47 U.S.C. § 251(c)(2) (2004)) describes the specific obligations of incumbent local exchange carriers with respect to interconnection. Section 252 (47 U.S.C. § 252 (2004)) sets forth "procedures for negotiation, arbitration, and approval of agreements" between CLECs and ILECs, such as petitioner. These agreements are known as interconnection agreements.

The Telecommunications Act also allows Bell operating companies (BOCs) to enter the interLATA long-distance market upon approval of the Federal Communications Commission (FCC). 47 U.S.C. § 271(d)(3) (2004). In a section 271 proceeding, the FCC permits the BOC to enter the long-distance market only after the

carrier implements the "competitive checklist." Checklist item two requires BOCs to provide "[n]on-discriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1) of this title." 47 U.S.C. § 271(c)(2)(B)(ii) (2004). Checklist items four, five, six, and ten require the BOC to provide unbundled access to local loops, local transport, local switching, and call-related databases. 47 U.S.C. § 271(c)(2)(B)(iv),(v),(vi),(x) (2004). In U.S. Telecom Ass'n v. F.C.C., 359 F.3d 554, 588 (D.C. Cir. 2004) (USTA II), the court found that "[t]he FCC reasonably concluded that checklist items four, five, six and ten imposed unbundling requirements for those elements independent of the unbundling requirements imposed by section 251 and section 252. In other words, even in the absence of impairment, BOCs must unbundle local loops, local transport, local switching, and call-related databases in order to enter the interLATA market."

Section 271 proceedings are stream-lined; the FCC must evaluate each of the fourteen requirements and render its decision within 90 days of the filing of the petition. 47 U.S.C. § 271(d)(3) (2004). In approximately 2003, petitioner secured the approval of the FCC to enter the long-distance service market.

Prior to the passage of the Telecommunications Act, Illinois took steps to encourage local telephone competition. The state had regulated petitioner by using a rate of return framework. Petitioner sought an alternative form of regulation

with fewer earnings restrictions and in exchange, agreed to open up portions of its network to its new competitors. In 1994, the Commission adopted a plan of alternative regulation for petitioner, pursuant to section 13-506.1 of the Public Utilities Act. (220 ILCS 5/13-506.1 (West 1992)). On June 30, 2001, section 13-801 of the Public Utilities Act (220 ILCS 5/13-801 (West 2000)) became law. Section 13-801(a) states:

> "This Section provides additional State requirements contemplated by, but not inconsistent with, Section 261(c) of the federal Telecommunications Act of 1996 [(47 U.S.C. § 261(c) (2000))], and not preempted by orders of the Federal Communications Commission. A telecommunications carrier not subject to regulation under an alternative regulation plan pursuant to Section 13-506.1 of this Act shall not be subject to the provisions of this Section, to the extent that this Section imposes requirements or obligations upon the telecommunications carrier that exceed or are more stringent than those obligations imposed by Section 251 of the federal Telecommunications Act of 1996 [(47 U.S.C. § 251 (2000))] and regulations promulgated thereunder. 220 ILCS 5/13-801 (2000).

On June 11, 2002, the Commission issued an order further

specifying petitioner's obligations under Section 13-801.

The FCC determines which network elements should be unbundled. Section 251(d)(2) requires the FCC to consider whether (1) access to such elements is necessary, and (2) the failure to provide access to such elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer. 47 U.S.C. § 251(d)(2) (2004). On August 13, 2003, the FCC issued a Triennial Review Order (TRO). The TRO set forth a new regulatory policy in response to court criticism of the FCC's earlier efforts to implement unbundling requirements (see United States Telecom Ass'n v. FCC, 290 F.3d 415, 422 (D.C. Cir. 2002) (USTA I)), and specifically mandated that state regulatory agencies review and amend their decisions to conform to the new federal regulatory framework. The Commission accordingly reopened proceedings examining Section 13-801. On February 4, 2005, the FCC issued a Triennial Review Remand Order (TRRO). The TRRO set forth additional changes to the federal regulatory framework in response to United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004) (USTA II). For example, ILECs no longer have an obligation to provide CLECs with unbundled access under section 251 of the Telecommunications Act, specifically to mass market local circuit switching and a platform of network elements commonly referred to as UNE-P. The TRRO provides for a 12 month transition period for existing CLEC customers for whom service is provided via UNE-P, and further states:

> "We expect that [ILECs] and competing carriers will implement the [Federal Communications] Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that the failure of an [ILEC] or a [CLEC] to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the [ILEC] and [CLEC] must negotiate in good faith regarding any rates, terms and conditions necessary to implement our rule changes."

The FCC distinguished the requirements of section 251 from the requirements of section 271, stating:

> "[T]he requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251 *** . [T]he plain language and the structure of section 271(c)(2)(B) establish that BOCs have an independent and ongoing access obligation under section 271. Checklist item 2 requires compliance with the general unbundling obli-

gations of section 251(c)(3) and of section 251(d)(2) which cross-references section 251(c)(3). Checklist items 4, 5, 6, and 10 separately impose access requirements regarding loop, transport, switching, and signaling, without mentioning section 251."

Shortly after the TRRO issued, petitioner sent a series of "Accessible Letters" to respondents, informing them that petitioner would refuse new requests for unbundled mass market local switching, effective March 11, 2005. In response, respondents initiated fast-track proceedings against petitioner pursuant to sections 13-514, 13-515, and 13-516 of the Public Utilities Act (220 ILCS 5/13-514, 13-515, 13-516 (West 2004)). Respondents questioned the validity of petitioner's "unilateral implementation" of the TRRO, and alleged petitioner engaged in anticompetitive conduct.

The Commission issued its 48-page, single-spaced order on June 2, 2005. The Commission examined seven interconnection agreements, finding five of the agreements "contain an SBC obligation to provide loops, transport and switching under [s]ection 271." The five agreements found to "contain an SBC obligation to provide loops, transport and switching under [s]ection 271" are the only interconnection agreements at issue in the present case. Further, the Commission found petitioner had engaged in anticompetitive conduct in violation of section 13-514 of the Public Utilities Act. The Commission awarded

respondents various portions of their attorney fees and ordered petitioner to pay a portion of the Commission's costs. This appeal followed.

The Commission is an administrative agency, and judicial review of its orders is limited. People ex rel. Hartigan v. Illinois Commerce Comm'n, 148 Ill. 2d 348, 366, 592 N.E.2d 1066, 1074 (1992). The Commission's findings of fact are prima facie correct and this court will not disturb those findings unless (1) they are against the manifest weight of the evidence, (2) beyond the statutory authority of the Commission, or (3) violative of constitutional rights. Hartigan, 148 Ill. 2d at 367, 592 N.E.2d at 1074. Moreover, the burden of proof is on the party appealing the Commission's decision. Hartigan, 148 Ill. 2d at 367, 592 N.E.2d at 1074. Although the Commission's ruling on a question of law is not binding on a reviewing court (Hartigan, 148 Ill. 2d at 367, 592 N.E.2d at 1074), we accord great deference because it is the "judgment of a tribunal appointed by law and informed by experience." United Cities Gas Co. v. Illinois Commerce Comm'n, 163 Ill. 2d 1, 12, 643 N.E.2d 719, 725 (1994), quoting Village of Apple River v. Illinois Commerce Comm'n, 18 Ill. 2d 518, 523, 165 N.E.2d 329, 331 (1960). See also Illinois Bell Telephone Co. v. Illinois Commerce Comm'n, 343 Ill. App. 3d 249, 255, 797 N.E.2d 716, 722 (2003) ("Illinois courts give great deference to the Commission's decisions, as they are the judgments of an administrative body with tremendous expertise in the field of public utilities and with the qualifications to inter-

pret specialized and highly technical evidence.").

Specific to the first issue, petitioner characterizes the interconnection agreements as written contracts and thus, suggests our review is de novo. We agree that the interpretation of a contract is a question of law to be reviewed de novo on appeal. K's Merchandise Mart, Inc. v. Northgate Ltd. Partnership, 359 Ill. App. 3d 1137, 1142, 835 N.E.2d 965, 970 (2005). However, the agreements at issue here are not usual contracts. Each is intertwined with statutes and regulations that the Commission has been charged with administering and thus, the circumstances suggest some deference to the Commission's reading of the agreements. See AFM Messenger Service, Inc. v. Department of Employment Security, 198 Ill. 2d 380, 395, 763 N.E.2d 272, 281 (2001) ("Even when we have reviewed an agency's interpretation *** de novo, we have acknowledged that the agency's interpretation was 'relevant.'")

We note further, where extrinsic evidence is needed to establish the intent of the parties, that intent is a question of fact and will not be disturbed on appeal unless it is contrary to the manifest weight of the evidence. K's Merchandise Mart, 359 Ill. App. 3d at 1142, 835 N.E.2d at 970. The primary objective in construing a contract is to determine and give effect to the intention of the parties at the time they entered into the contract. K's Merchandise Mart, 359 Ill. App. 3d at 1142, 835 N.E.2d at 970. The language used in the contract generally is the best indication of the parties' intent. K's Merchandise

Mart, 359 Ill. App. 3d at 1142, 835 N.E.2d at 971. However, "[a] word is not a crystal, transparent and unchanged[;] it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." K's Merchandise Mart, 359 Ill. App. 3d at 1142, 835 N.E.2d at 971, quoting Towne v. Eisner, 245 U.S. 418, 425, 62 L. Ed. 372, 376, 38 S. Ct. 158, 159, (1918) (opinion by Justice Holmes). The contract must be construed as a whole, taking into account the overall purpose of the contract, and the context in which the language is used. K's Merchandise Mart, 359 Ill. App. 3d at 1142, 835 N.E.2d at 971. In Illinois, a written contract is presumed to include all material terms agreed upon by the parties, and any prior negotiations or representations are merged into that agreement; extrinsic evidence, parol or otherwise, of antecedent understandings and negotiations is generally inadmissible to alter, vary, or contradict the written instrument. K's Merchandise Mart, 359 Ill. App. 3d at 1142, 835 N.E.2d at 971.

Petitioner first argues that the Commission failed to properly interpret the interconnection agreements between petitioner and respondents, (1) Global TelData II, LLC (Global), (2) McLeod USA Telecommunications Services, Inc. (McLeod), (3) Talk America, Inc. (Talk), (4) XO Communication Services, Inc. (XO), and (5) Allegiance Telecom of Illinois, Inc. (Allegiance). Specifically, do the interconnection agreements require petitioner to provide access to certain unbundled network elements (UNEs) pursuant to section 271 of the Telecommunications Act?

In the Global and XO agreements, section 29.20 provides:

> "This agreement is the exclusive arrangement under which the [p]arties may purchase from each other the products and services described in [s]ections 251 and 271 of the [Telecommunications] Act and, except as agreed upon in writing, neither [p]arty shall be required to provide the other [p]arty a product or service described in [s]ections 251 and 271 of the Act that is not specifically provided herein."

The Commission found section 29.20 clearly references section 271 of the Telecommunications Act and provides Global and XO with "an irrefutable enforcement right under the contract." Petitioner suggests we examine Article IX, entitled "Unbundled Access - Section 251(c)(3)," where "[t]here is no reference whatsoever to Section 271." Although Article IX may not reference section 271, section 29.20 clearly references section 271 of the Telecommunications Act and therefore, provides Global and XO with "an irrefutable enforcement right under the contract."

Petitioner next argues that the relevant UNEs are "status quo elements" and that petitioner's obligation to provide access to such elements has "expired" under the terms of the agreement with XO. The agreement provides that "status quo elements" are those elements "impacted by USTA II." USTA II

"impacted" section 251 elements, and not section 271 elements. The relevant UNEs are not "status quo elements" and petitioner's obligation to provide access to such elements has not "expired."

Further, the Commission held that the "status quo elements" did not expire where "otherwise required by Applicable Law." Section 2.2 of the agreement defines "Applicable Law" as "all laws, statutes *** orders *** of any Governmental Authority that applies to the Parties or the subject matter of the Agreement or this Amendment." The Commission found that section 271 fell within "this expansive definition of 'Applicable Law.'"

Similarly, the Allegiance, McLeod, and Talk agreements provide:

> "Unless otherwise provided by Applicable Law, this Agreement shall be governed by and construed in accordance with the [Federal] Act, the FCC Rules and Regulations interpreting the Act and other applicable federal law."

Petitioner objects to the quoted portions of the agreements that do not "expressly mention Section 271." However, the Commission characterized the language as an "expansive definition of 'Applicable Law,' and thus including section 271. The Commission further noted:

> "[Petitioner] could have refused to include, in its [agreements], references to entire comprehensive statutes or general bodies of law (e.g., "applicable law"), in order to

avoid application of specific provisions within those greater categories. However, contracting parties make pragmatic judgments about the risks and benefits of broad language and sometimes prefer the flexibility (along with the exposure) that such language affords. That was presumably the case here."

Also in the Allegiance, McLeod, and Talk agreements, section 20.1 of the "APPENDIX UNE" states that petitioner's "provision of UNEs identified in this Agreement is subject to the provisions of the Federal Act, including but not limited to, Section 251(d)." (Emphasis added.)

Further, in the Allegiance, McLeod, and Talk agreements, section 2.2 of the "APPENDIX UNE" states:

"2.2 [Petitioner] will provide CLEC nondiscriminatory access to UNEs (Act, Section 251(c)(3), Act, and Section 271(c)(2)(B)(ii); 47 CFR Section 51.307(a)):

2.2.1 At any technically feasible point (Act, Section 251(c)(3); 47 CFR Section 51.307(a));

2.2.2. At the rates, terms, and conditions which are just, reasonable, and nondiscriminatory (Act, Section 251(c)(3); 47 CFR Section 51.307(a));

2.2.3. In a manner that allows CLEC to

> provide a Telecommunications Service that may be offered by means of that UNE (Act, Section 251(c)(3); 47 CFR Section 51.307(c));
>
> ***
>
> 2.2.9 Only to the extent it has been determined that these elements are required by the 'necessary' and 'impair' standards of the Act, Section 251(d)(2) and/or in accordance with state law within the state this Interconnection Agreement is approved."

The Commission noted there are no necessary and impair standards apart from section 251 of the Act. Because section 2.2.9 of the "APPENDIX UNE" refers to the necessary and impair standards in both "the Act," and in Section 251, the Commission found "the intention" ambiguous. Petitioner argues that section 271(c)(2)(B)(ii) simply requires a Bell operating company (BOC) to provide "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1) of this title." 47 U.S.C. 271(c)(2)(B)(ii). Thus, petitioner argues that "the obligations associated with [s]ection 271(c)(2)(B)(ii) are coterminous with those under [s]ection 251(c)(3)." Further, petitioner argues there is no ambiguity, "[s]ection 2.2.9 plainly and explicitly refers to the necessary and impair standard of [s]ection 251." (Emphasis in original.) The Commission disagreed, stating:

> "[T]he provision of 271 UNEs is contemplated

> by the quoted text, principally because [petitioner's] nondiscrimination duty under subsection 271(d)(2)(B)(ii) is cited as a predicate for [petitioner's] unbundling obligations. Since Section 251 has its own nondiscrimination requirement (in subsection 251(c)(3)), the parties reference to subsection 271(d)(2)(B)(ii) would be superfluous unless Section 271 unbundling duties were included within section 2.2 of the Appendix."

Further, the Commission found text in the Talk agreement, under the heading "Unbundled Network Elements - Section 251(c)(3)," that states: "[Petitioner] will provide CLEC access to [UNEs] for the provision of telecommunications services as required by sections 251 and 252 of the [Federal] Act and in the appendices hereto." The Commission found the referenced language "does not exclude 271 UNEs and this Order construes the UNE Appendix, which is more specific to the provision of UNEs, to include 271 UNEs in the contract."

After weighing these arguments very carefully, we find the Commission's interpretation of the language of the interconnection agreements is not contrary to established principles of contractual interpretation, and we defer to such an interpretation. The Commission did not fail to properly interpret the interconnection agreements between petitioner and respondents.

Petitioner next argues that the Commission failed to

properly interpret section 13-514 of the Public Utilities Act. Specifically, did the Commission err when it found petitioner violated section 13-514 of the Public Utilities Act?

As stated above, the Commission's findings of fact are prima facie correct and this court will not disturb those findings unless (1) they are against the manifest weight of the evidence, (2) beyond the statutory authority of the Commission, or (3) violative of constitutional rights. Hartigan, 148 Ill. 2d at 367, 592 N.E.2d at 1074. Although the Commission's ruling on a question of law is not binding on a reviewing court (Hartigan, 148 Ill. 2d at 367, 592 N.E.2d at 1074), we accord great deference because it is the "judgment of a tribunal appointed by law and informed by experience." United Cities Gas Co. v. Illinois Commerce Comm'n, 163 Ill. 2d 1, 12, 643 N.E.2d 719, 725 (1994), quoting Village of Apple River v. Illinois Commerce Comm'n, 18 Ill. 2d 518, 523, 165 N.E.2d 329, 331 (1960). See also Illinois Bell Telephone Co. v. Illinois Commerce Comm'n, 343 Ill. App. 3d 249, 255, 797 N.E.2d 716, 722 (2003) ("Illinois courts give great deference to the Commission's decisions, as they are the judgments of an administrative body with tremendous expertise in the field of public utilities and with the qualifications to interpret specialized and highly technical evidence.").

Shortly after the TRRO issued, petitioner sent a series of "Accessible Letters" to respondents, informing them that petitioner would refuse new requests for unbundled mass market local switching, effective March 11, 2005. The first "Accessible

Letter" (AL-17) at issue states, in part:

> "Accordingly, as of the effective date of the TRO Remand Order, i.e., March 11, 2005, CLECs are no longer authorized to place, nor will SBC accept, New (including new lines being added to existing Mass Market Unbundled Local Switching/UNE-P accounts), Migration or Move LSRs for Mass Market Local Switching/UNE-P. Any New, Migration or Move LSRs placed for Mass Market Unbundled Local Switching/UNE-P after March 11, 2005 will be rejected. The effect of the TRO remand Order on New, Migration or Move LSRs for Mass Market Unbundled Local Switching/UNE-P is operative notwithstanding interconnection agreements or applicable tariffs."

A second "Accessible Letter" (AL-18) states in part:

> "As explained in [AL-17] as of the effective date of the TRO Remand Order, i.e., March 11, 2005, you are no longer authorized to send, and SBC will no longer accept, New (including new lines being added to existing Mass Market Unbundled Local Switching/UNE-P accounts), Migration or Move LSRs for Mass Market Unbundled Local Switching/UNE-P. Any New, Migration or Move LSRs placed for Mass Market

Unbundled Local Switching/UNE-P on or after the effective date of the TRO Remand Order will be rejected."

A third "Accessible Letter" (AL-19) states in part: "As set forth in the TRO Remand Order, specifically in Rule 51.319(a)(6), as of March 11, 2005, CLECs 'may not obtain,' and SBC and other ILECs are not required to provide access to Dark Fiber Loops on an unbundled basis to requesting telecommunications carriers. The TRO Remand Order also finds, specifically in Rules 51.319(a)(4), (a)(5) and 51.319(e), that, as of March 11, 2005, CLECs 'may not obtain,' and SBC and other ILECs are not required to provide access to DS1/DS3 Loops or Transport or Dark Fiber Transport on an unbundled basis to requesting telecommunication carriers under certain circumstances. Therefore, as of March 11, 2005, in accordance with the TRO Remand Order, CLECs may not place, and SBC will no longer provision New, Migration or Move Local Service requests (LSRs) for affected elements."

A fourth "Accessible Letter" (AL-20) states in part: "As explained in [AL-19], as of the effective date of the TRO Remand Order, i.e., March 11,

> 2005, you are no longer authorized to send, and SBC will no longer accept, New, Migration or Move LSRs for unbundled high-capacity loops or transport, as is more specifically set forth in that Accessible Letter, and such orders will be rejected."

Petitioner issued a fifth "Accessible Letter" (AL-39) following a grant of emergency relief to respondents. Petitioner prescribed procedures by which respondents could obtain high capacity loops and dedicated transport through a self-certification process, irrespective of the prohibitions announced in AL-18 and AL-20.

Section 13-514 of the Public Utilities Act (220 ILCS 5/13-514 (West 2004)) provides that "[a] telecommunications carrier shall not knowingly impede the development of competition in any telecommunications service market." The act identifies twelve prohibited actions that are considered per se impediments to the development of competition; however, the Act further states that the Commission is not limited in any manner to the enumerated impediments and may consider other actions which impede competition to be prohibited. The Commission found that petitioner violated subsections (2), (6), (8), (10), (11), and (12) of section 13-514. The relevant "prohibited actions" are:

> "(2) unreasonably impairing the speed, quality, or efficiency of services used by another telecommunications carrier;

***

(6) unreasonably acting or failing to act in a manner that has a substantial adverse effect on the ability of another telecommunications carrier to provide service to its customers;

***

(8) violating the terms of or unreasonably delaying implementation of an interconnection agreement entered into pursuant to Section 252 of the federal Telecommunications Act of 1996 in a manner that unreasonably delays, increases the cost, or impedes the availability of telecommunications services to consumers;

***

(10) unreasonably failing to offer network elements that the Commission or the Federal Communications Commission has determined must be offered on an unbundled basis to another telecommunications carrier in a manner consistent with the Commission's or Federal Communications Commission's orders or rules requiring such offerings;

(11) violating the obligations of Section 13-801; and

(12) violating an order of the Commission regarding matters between telecommunications carriers." 220 ILCS 5/13-514 (West 2004).

Petitioner argues it did not (1) act unreasonably, (2) impair or impede service, or (3) violate law because "no one was ever denied anything." Petitioner characterizes the "Accessible Letters" as simple statements of position that did not cause harm to any telecommunications carrier.

In its order, the Commission characterized the "Accessible Letters" as "Improper Unilateral Implementation of the TRRO." The TRRO provides: "We expect that [ILECs] and competing carriers will implement the [Federal Communications] Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that the failure of an [ILEC] or a [CLEC] to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the [ILEC] and [CLEC] must negotiate in good faith regarding any rates, terms and conditions necessary to implement our rule changes."

The Special Assistant Attorney General, for the Commission, characterizes petitioner's argument as a "no harm, no foul" argument, stating:

"[Petitioner's] argument *** would preclude any finding of a violation of the remedial scheme set forth in section 13-514 of the

> [Act], or its related provisions, sections 13-515 and 13-516, simply because the company obeyed the Commission's orders forbidding further unilateral actions that would have had a deleterious effect on the complaining CLECs[,] actions that promoted the CLECs to file their complaints in the first place."

The Commission argues it properly found violations of section 13-514 where petitioner "threatened harm" and further, petitioner's argument "more properly addresses whether its ["Accessible Letters"] have caused damages, not violations." (Emphasis in original.) The Commission asserts "there is no requirement that the affected CLEC demonstrate that the conduct actually impedes competition; rather the statute presumes that a competitive impediment will result from the conduct." Further, the Commission denied respondents monetary damages, stating:

> "Despite the contents of [petitioner's 'Accessible Letters'] the complaining CLECs have apparently not been denied assess to the pertinent UNEs," even under Section 251, because of the combined effect of emergency relief and [petitioner's] forbearance."

The "Accessible Letters" were more than harmless statements of position. The Commission properly interpreted section 13-514 of the Public Utilities Act, finding petitioner violated subsections (2), (6), (8), (10), (11), and (12) of

section 13-514.

Alternatively, petitioner argues it "correct[ed] the situation" under section 13-515(c) of the Act (220 ILCS 5/13-515(c) (West 2004)), when it assured respondents it "would not reject UNE-P orders while the state law UNE-P requirements remain in effect." Section 13-515(c) provides that "[n]o complaint may be filed under this Section until the complainant has first notified the respondent of the alleged violation and offered the respondent 48 hours to correct the situation." (220 ILCS 5/13-515(c) (West 2004). Following issuance of the various "Accessible Letters," respondents notified petitioner of the alleged violations and offered petitioner 48 hours to correct the situation. Petitioner argued before the Commission, and now before this court, that it "correct[ed] the situation," assuring respondents it "would not reject UNE-P orders while the state law UNE-P requirements remain in effect." The Commission responded:

> "[E]ven if it were assumed that SBC's purported correction contained a clear and binding promise to continue furnishing state law UNEs (and it did not), it still failed to address most of the CLECs' alleged violations. In its subsection 13-515(c) notice of alleged violation, each CLEC averred that SBC was contravening federal law and the CLEC's [interconnection agreement], as well as state law. In its response to the

CLECs' notices, SBC stated only that it would not reject ULS/UNE-P requests premised on state law (and only until a federal court, in a pending action concerning that state law unbundling obligation, issued a ruling). SBC's silence about its alleged federal obligations and associated [interconnection agreement] violations is significant, since the TELRIC-based price of a Section 251 UNE is below the price of a state law UNE.

Moreover, SBC's ostensible corrective statement did not address loops or transport, was not binding on SBC, was time-limited and did not extend to any CLEC lacking a 'right' to purchase state law UNEs under its 'existing [interconnection agreement] or tariff.' SBC has denied the existence of such right throughout this proceeding and in federal court, both in general and for the specific CLECs here. Accordingly, SBC's claimed corrective action does not prohibit this Commission from finding violations of the specific provisions of Section 13-514." (Emphasis in original.)

The record is clear that respondents notified petitioner of the alleged violations and petitioner responded.

However, petitioner's "assurances" failed to "correct the situation" as required by section 13-515(c) of the Public Utilities Act.

For the reasons stated, we affirm the Commission's order.

Affirmed.

McCULLOUGH, J., with KNECHT and COOK, JJ., concurring.